JD(NY)–08–15
Bronx, NY
Hackensack, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

MILVEEN ENVIRONMENTAL SERVICES

and

Case 22-CA-096873
22-CA-105863

LOCAL 32BJ, SERVICE EMPLOYEES INTERNATIONAL UNION

Saulo Santiago, Esq., Newark, NJ, for the General Counsel.
Dr. Milton Eke, president and chief executive officer, Bronx, NY, for the Respondent.
Brent Garren, Esq., deputy general counsel, Service Employees International Union, 32 BJ SEIU, New York, NY for the Charging Party.

DECISION

Steven Fish, Administrative Law Judge: Pursuant to charges filed by Local 32BJ, Service Employees International Union (the Union) on January 22, 2013 in Case No. 22-CA-096873 and in Case No. 22-CA-105863 on March 31, 2013,[1] respectively, the Acting Regional Director for Region 22 issued a complaint on December 23, alleging that Milveen Environmental Services (Respondent) violated Section 8(a)(1) and (5) of the Act.

The trial with respect to the allegations in the complaint was held before me in Newark, NJ on February 4 and April 29, 2014. Briefs have been filed by General Counsel and by Charging Party, and Respondent presented an oral argument.

Based upon the entire record, including my observation of the demeanor of the witnesses, I issue the following:

Finding of Fact and Conclusions of Law

I. Jurisdiction and Labor Organization

The Respondent is a New York corporation with an office in Bronx, NY and has provided janitorial services in the State of New Jersey, including in the Bergen County Public Building (Bergen County Department of Public Works, Division of General Services) in Hackensack, NJ.

During the preceding twelve months, Respondent provided services valued in excess of $50,000 to public entities, including the Bergen County Department of Public Works, an

[1] All dates, hereinafter, are in 2013, unless otherwise indicated.

enterprise directly engaged in interstate commerce.

It is admitted, and I so find, that Respondent is and has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

It is also admitted, and I so find, that Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

II. Facts

Bergen County contracts out janitorial services for the Bergen County Public Building, located at One Bergen Plaza, in Hackensack, NJ. Prior to April of 2012, the contract to perform this work had been performed by Maverick Building Services Inc. (Maverick), located at 22 Chestnut Street, in Rutherford, NJ.

Maverick employed a supervisor and twelve employees to clean the building. The employees of Maverick were represented by the Union and covered by a collective bargaining with the Union and the New Jersey Contractors Agreement (NJCA), which was effective January 1, 2012 and expiring December 31, 2015.

The contract provides for payments to be made by the employer for all employees covered to the Union's legal assistance and training funds. The contract also provided medical benefit payments to be made by the employer for all full-time employees.[2]

Maverick's part-time employees were provided dental and vision insurance, apparently, based on the contract's provision that contributions shall be made for part-time employees of $78.00 per month to the Union's health fund, payable to cover such health benefits as may be determined by the trustees of the health fund. Employees also received, under the contract 3-5 weeks of vacation per year and four paid sick days per year, provided in their first year of employment, paid bereavement leave, paid for jury duty and were guaranteed a minimum of four hours of work per day under the contract.

The 12 employees employed by Maverick included Julio De La Torre, who was employed as a full-time employee on the day shift, and Lina Marin, who was the shop steward for the Union. Marin was employed by Maverick since 2004. Prior to 2004, Marin was employed by All Clean, the contractor at the building at One Bergen Plaza prior to Maverick taking over the contract.

In addition to Marin and De La Torre, Maverick employed ten other employees, Aydee Ramirez Chica, Ana Moronta Caraballo, Manual Castillo, Romelinda Colon, Narcisa Rugel Zambrano, Lidia Bonchon, Milenia Batista, Gloria Amon, Jenny Garcia and Felix Ventura.

The county put out the contract for bidding at One Bergen Plaza in late 2011. After bids were submitted, the contract was awarded to Chuk's Professional Cleaning Co. (Chuk's).

Kevin Brown, the Union's vice-president and New Jersey State director, was notified in March of 2012 by Robert Karp, manager of Maverick, that Maverick had lost the contract for the building and that it had been awarded to Chuk's, who was the low bidder.

[2] Full-time is defined as working 27.5 hours a week.

Brown immediately contacted Bergen County Administration and notified them that Chuk's was a problematic employer and the Union had problems with Chuk's at other sites. Brown stated that Chuk's did not want to be Union and that Chuk's would be likely to violate the wage and benefit stipulation that was in the RFP. In that regard, the RFP bid requires the contractor to agree to pay certain wages and benefits to its employees.

In that case, for Chuk's, the RFP called for $8.75 per hour salary with a $2.00 supplement for healthcare.

Brown then spoke to his subordinates, Pat Cabrera, commercial division director, and Zaida Polanco, field representative, about instituting a "fight back campaign," where the Union attempts to assist the workers, who might lose jobs as a result of a loss of a contract, to apply for and obtain jobs with the new contractor and to help persuade the new contractor to hire the employees and recognize the Union.

In that regard, Brown sent a fax and letter to Chuk's, dated April 2, 2012, reading as follows:

April 2, 2012

VIA FACSIMILE 973-759-0068 and OVERNIGHT MAIL
Livinus Mbamara
President and CEO
CHUK'S Professional Cleaning
109 Washington Avenue
Belleville, NJ 07109

Re: Bergen County Public Building
One Bergen County Plaza, Hackensack, New Jersey

Dear Mr. Mbamara:

We were notified that CHUK's Professional Cleaning is taking over the cleaning services for the Bergen County Public Building located at One Bergen County Plaza, Hackensack, New Jersey.

Please be advised that SEIU Local 32BJ currently represents the cleaners at the Bergen County Public Building located at One Bergen County Plaza, Hackensack, New Jersey. This letter shall serve as formal application for all (12) twelve employees, who have worked for many years at the building for Maverick Building Services. A list of these employees and with seniority information is enclosed for your convenience.

These 12 employees are ready, willing, and able to work for CHUK's Professional Cleaning. In order to assure a smooth transition to employment, please contact me at 973-324-3225, ext. 2254 to coordinate the application process. We will work with you to complete this process as soon as possible in order to assure a smooth transition when you take over soon at the above site. As always, please feel free to contact me at any time.

Sincerely,
Kevin Brown
New Jersey District Director

The list submitted to Chuk's consisted of the above mentioned employees, including De La Torre and Lina Marin. Marin was listed as steward. De La Torre was the only employee on the list as a full-time employee. The rest were all part-time.

Subsequently, also on April 2, Polanco faxed to Chuk's a petition signed by former Maverick employees, reading as follows:

April 2, 2012

VIA FACSIMILE 973-759-0068 and OVERNIGHT MAIL
Livinus Mbamara
President and CEO
CHUK'S Professional Cleaning
109 Washington Avenue
Belleville, NJ 07109

Re: Bergen County Public Building
One Bergen County Plaza, Hackensack, New Jersey

Dear Mr. Mbamara:

We are the janitors who work for the Bergen County Public Building located at One Bergen County Plaza, Hackensack, New Jersey. We want to continue working in this facility when your company takes over the contract and by this letter we are letting you know that we want to [SIC] apply with your company. Please contact us so we can fill out applications.

Nosotros somos los trabajadores de limpieza trabajando para el Bergen County Public Building localizado en el One Bergen County Plaza, Hackensack, New Jersey. Queremos seguir trabajando en este edificio cuando su compañia tome el contrato y por esta carta le estamos dejando saber que estamos planeando hacer aplicaciones con su compañia. Por favor en este contacto con nosotros para que podamos llenar una aplicación.

Name/Nombre	Building/Edificio
Aydee Pa	
Lina + Lavin	
Gloria Amon	
[illegible]	
Jenny Garcia	
ANA CABALLO	
Millenia Batista	
Romelinda Idon	
manuel I. castillo	
Maria V Ruget	

April 2, 2012

VIA FACSIMILE 973-759-0068 and OVERNIGHT MAIL
Livinus Mbamara
President and CEO
CHUK'S Professional Cleaning
109 Washington Avenue
Belleville, NJ 07109

Re: Bergen County Public Building
One Bergen County Plaza, Hackensack, New Jersey

Dear Mr. Mbamara:

We are the janitors who work for the Bergen County Public Building located at One Bergen County Plaza, Hackensack, New Jersey.
We want to continue working in this facility when your company takes over the contract and by this letter we are letting you know that we want to [SIC] apply with your company. Please contact us so we can fill out applications.

Nosotros somos los trabajadores de limpieza trabajando para el Bergen County Public Building localizado en el One Bergen County Plaza, Hackensack, New Jersey. Queremos seguir trabajando en este edificio cuando su compañia tome el contrato y por esta carta le estamos dejando saber que estamos planeando hacer aplicaciones con su compañia. Por favor en este contacto con nosotros para que podamos llenar una aplicación.

Name/Nombre
Lidia Bandon
Julio De La Torre

Polanco also telephoned Chuk's and spoke to the owner, Livinus Mbamara. Polanco explained to Mbamara that the Union was notified that Chuk's was taking over the cleaning services at One Bergen Plaza, and she wanted to make sure that there was not going to be any interruption regarding the employment of the employees.

Mbamara informed Polanco that he did not know yet that they were going to take over the contract. Polanco informed him that she had been told that they did receive the bid and asked him to call her to go over the application process to avoid any interruption in employment. Mbamara promised that he would call Polanco, but he never did.

In response to Brown's letter, Mbamara did respond and agreed to meet with the Union. Mbamara met with union representatives, and they asked Mbamara to hire the former union workers employed by Maverick and then to recognize the Union. Mbamara told the union representatives that he would think about it, but he never got back to the Union and never hired any of the former Maverick employees.

On Friday, April 6, Marin phoned Polanco and informed her that the Maverick employees

had been informed that Chuk's was starting the job on Monday, April 9 and that the former employees had not been given job applications yet.

After the call from Marin, Polanco phoned Mbamara. She explained that she had been informed that Chuk's was taking over on Monday, April 9 and reminded him that she had reached out to him over a week ago about the application process for the Maverick employees and that she was expecting a return call from him.

Polanco offered to come to the site that night to pick up the applications and have them filled out. Mbamara told her that the office was closed that day, but she could come in on Monday, April 9, pick up applications and submit them by Wednesday, April 11, 2012.

On Monday, April 9, 2012, Polanco went to the site, picked up the job applications from Chuk's secretary and met with all 12 employees. The employees all filled out the job applications given to Polanco by Chuk's secretary, plus I-9 and W-4 forms, and faxed the documents to Chuk's on April 11, 2012.

On Thursday, April 12, 2012, Polanco sent the following email to Chuk's, following up on her prior fax of the applications.

Dear Mr. Mbamara:

As pursuant to your secretary's request, kindly review the attached completed job applications which were faxed to your office yesterday. This email shall serve as formal application for all (12) twelve previous employees, who have worked for many years at the building for Maverick Building Services

Kindly review the attached job applications from the following workers together with their work documentations:
-Julio De La Torre
-Felix Ventura
-Aydee Ramirez
-Ana Caraballo
-Manuel Castillo
-Romelinda Colon
-Narcisa Zambrano
-Lidia Banchon
-Milenia Batista
-Gloria Amon
-Lina Marin
-Jenny Garcia

These 12 employees are ready, willing, and able to work for CHUCK's Professional Cleaning as soon as possible. In order to assure a smooth transition to employment, please contact me directly at 973-296-4360, to coordinate the application process.

Should you have any questions, please do not hesitate to contact me directly.

Thanks.

Zaida Polanco
New Jersey District Delegate SEIU Local 32BJ
1 Washington Park, 12th Floor
Newark, NJ 07102
P: 973-824-3225 Ext. 2234
F: 973-623-8602
zpolanco@seiu32bj.org

Subsequently, Polanco reached Mbamara by phone, who confirmed that he had received the applications and that he would review them and would call the employees if he had any vacancies. Polanco questioned why the Maverick employees were not hired since they had experience working at the building. Mbamara explained that he had already hired his staff and added that the Maverick employees did not have experience in carpet cleaning.

Thereafter, the Union continued actively campaigning to obtain employment for the Maverick employees. They had weekly meetings with the employees and engaged in a leafleting campaign to the public at the building. The former Maverick employees participated in the leafleting along with the union representatives at the building from April through August of 2012. The leaflets that the Union and the employees distributed to the public read as follows:

CHUCK'S Professional Cleaning Pays Poverty Wages!!

CHUCK'S is the cleaning contractor providing services at THE BERGEN COUNTY PUBLIC BUILDING.

THE COMPANY HAS A HISTORY OF VIOLATING WORKERS' RIGHTS & PAYING POVERTY WAGES TO ITS CLEANERS

TELL CHUCK TO STOP REFUSING TO RETAIN THE 12 WORKERS FORMERLY EMPLOYED BY MAVERICK BUILDING

SEIU LOCAL 32BJ * 1 WASHINGTON STREET, 12TH FLOOR * NEWARK, NJ 07102 * 973-824-3225
32BJ HAS A DISPUTE WITH CHUCK THE CLEANING CONTRACTOR IN YOUR BUILDING. NO DISPUTE WITH ANY OTHER EMPLOYER. THIS IS NOT A REQUEST FOR ANYONE TO CEASE PERFORMING SERVICES OR PICKING UP OR DELIVERY GOODS.

Justice for New Jersey Janitors!

On April 9th, 2012 (12) twelve janitors employed by Maverick Building Services at One Bergen County Plaza, BERGEN COUNTY PUBLIC BUILDING, in Hackensack, New Jersey lost their jobs, when The BERGEN COUNTY Administrator, switched to an irresponsible cleaning contractor.

CHUCK'S PRFESSIONAL CLEANING, the new cleaning contractor refused to retain the twelve (12) workers formerly employed by Maverick Building Services.

*** HELP GET WORKERS THEIR JOBS BACK ***

Call Mr. Livinus Mbamara, President/CEO of CHUCK's Professional Cleaning at (973) 759-0014 & tell him you support justice for New Jersey janitors.

SEIU Local 32BJ • 1 Washington Place, 12th Floor • Newark, NJ 07102 • 973-824-3225

32BJ has a dispute with the cleaning contractor in your building.
No dispute with any other employer.
This is not a request for anyone to cease performing services or picking up or delivering goods.

Additionally, during this period of time, Brown had contacts with Bergen County officials, in which he complained about Chuk's failure to hire the Maverick union workers and Chuk's failure to follow the RFP. In that regard, Brown was informed by Polanco that Chuk's was not adhering to the RFP requirements of pay the $2.00 per hour supplement for healthcare.

Brown spoke to Rob Garrison, deputy director of the Bergen County Executive's Office, and informed him of these reports and asked if the county could cancel Chuk's contract, rebid the contract and adjust the new RFP in view of the increases in the Master Agreement and make sure that the new contractor would hire the employees that had worked there for many years.

Garrison reacted favorably to Brown's requests, stating that if evidence was provided of violations of the RFP, the county would proceed. Garrison added that he was disappointed that Chuk's didn't hire the workers since they were good employees.

Sometime thereafter, the county terminated the contract with Chuk's and put out the contract for a new bid with adjusted RFP rates. The new rates were increasing the minimum salary from $8.75 to $10.75 per hour, plus the $2.00 per hour supplement for healthcare.

According to Joseph Crifasi, Bergen County director of public works and overseeing janitorial services at the Bergen County facilities, and Patricia Rodriguez, administrative assistant in-charge, the county terminated Chuk's contract because of repeated performance complaints from the building about the service from the tenants.

On September 12, 2012, Respondent, who was the low bidder, was awarded the contract. On September 18, Crifasi and Rodriguez met with Dr. Milton Eke, Respondent's president and CEO. Crifasi told Dr. Eke that he expected Respondent to comply with the contract and the county had problems with the prior contractor and he did not want these problems to be repeated. Crifasi told Eke that if he had problems he should direct them to Rodriguez.

Rodriguez asked Dr. Eke if he had hired his cleaning staff yet. Dr. Eke replied that he was taking applications and still looking. Rodriguez told Dr. Eke that she knew of an individual, Julio De La Torre, who had worked for the previous contractor (prior to Chuk's) and who she recommended that Eke hire since De La Torre was a wonderful employee and suggested that De La Torre could help him to manage. While De La Torre had not been hired by Chuk's, he was still working in the building as a part-time employee on the payroll of Bergen County. According to Rodriguez, after Chuk's took over and did not hire De La Torre, she felt that De La Torre was a good worker and recommended that the county hire him as a part-time worker to do recycling work. The county agreed with her recommendation, and De La Torre continued to work in the building.

Dr. Eke told Rodriguez that he would be interested in talking to De La Torre. Rodriguez called De La Torre, and a few minutes later, De La Torre came to the conference room, where the meeting was taking place. Rodriguez introduced De La Torre to Dr. Eke, who then took him on a tour of the building.

About forty minutes later, De La Torre came into Rodriguez's office and informed her that Dr. Eke had agreed to hire De La Torre as the night supervisor and that Dr. Eke had also agreed, pursuant to De La Torre's recommendation, to also hire the employees, who had worked with De La Torre as employees of Maverick, the previous employer before Chuk's.

De La Torre added that Dr. Eke was faxing over blank employment applications to her office for Rodriguez to make copies. On that same date, Dr. Eke faxed over blank employment applications to the county building, and Rodriguez made copies for De La Torre to be filled out by the former Maverick employees.

On September 20, 2012, De La Torre telephoned shop steward Marin and informed her that Chuk's had lost the contract, and Respondent had been selected to take over the contract. He told Marin that Respondent had hired him as the night supervisor and also agreed to hire the former Maverick employees. De La Torre also informed Marin that the owner of the new company did not want the Union. Marin agreed that the employees needed to go back to work and offered to help to get the employees together to fill out the applications. Marin told De La Torre that she would fill out an application also and apply but that she would not accept the job because she would be moving to Florida.

Marin then telephoned all of the former Maverick employees and informed them that Respondent intended to hire them but that Respondent did not want the Union. She told them to meet at the building and to fill out job applications. The employees met the next day with Marin and De La Torre at the building. De La Torre had no conversations with the employees on that day other than to give them the job applications to fill out that he had been given. The employees filled out the job applications and returned them to De La Torre. The applications were dated September 20 and September 21, 2012.

On or about September 26, 2012, Polanco telephoned De La Torre and congratulated him on his new position. De La Torre confirmed that he had been hired by Respondent as supervisor and told Polanco that Respondent was going to hire nine of the former Maverick employees and would hire three former employees from Chuk's and that he (De La Torre) had already given the applications to the employees. He also told Polanco that Respondent was either going to pay the employees $12.75 per hour with no benefits or $10.75 with benefits. Polanco replied that she was pleased and that she would get in contact with Respondent to start the bargaining process.

De La Torre responded that Respondent did not want the Union in the building and that this was the only condition for the employees to get hired. Polanco informed De La Torre that he shouldn't worry about that, the main thing is for the workers to come back to work and that she would get in contact with Respondent and deal with Respondent's bargaining obligation. Polanco then sent an email to Brown, dated September 26, 2012, detailing her conversation with De La Torre. It reads:

> From: Zaida Polanco
> Sent: Wednesday, September 26, 2012 3:49 PM
> To: Kevin Brown
> Cc: Patricia Arcila Cabrera; Kevin Brown; Brent Garren; Hashim Shomari
> Subject: One Bergen Plaza – Fightback - Update
>
> Hi, Kevin:
> Great news!! All the workers completed their job applications and they were call in to work next Monday @ 5pm. Please be advised that the new company (Milveen Environmental Services) kept 3 workers from CHUCKS (1 during the day shift and 2 during the night shift) due to the fact that the tenants from the 3rd and 5th floors requested for those 3 workers to stay. Before CHUCKS took over, Julio De La Torre used to work the morning shift, but he is now working the morning shift directly with Bergen County. Now Julio was offered the supervising position for the night shift. As of

today, 2 of our members were not called: Lina Marin (she is moving to Florida as of 10/15/12, she is choosing not to return because she is moving away) and Lidia Banchon (she used to be the night lead person), but the security guards told the new company not to hired her because she used to be very irresponsible and she used to come in late almost every day).
As of now...we only have Lidia Banchon that I have to worry about placing her in another building.

As per Julio/Lina, their salary would be $12.75 (no benefits).

I'm meeting with some of the workers today and tomorrow. We are centralizing a meeting before they begin to work on Monday. We need to sign new cards, just in case.

Should I send the new company any correspondence? Meet for bargaining?

Thanks in advance.

Zaida Polanco
New Jersey District Delegate SEIU Local 32BJ
1 Washington Park, 12th Floor
Newark, NJ 07102
P: 973-824-3225 Ext. 2234
F: 973-623-8602
zpolanco@seiu32bj.org

After her conversation with De La Torre, Polanco called Respondent and left a voicemail message, asking Dr. Eke to call her to arrange a meeting with the Union to bargain since Respondent had agreed to hire the majority of Maverick's employees.

Dr. Eke did not respond to Polanco's message.

On September 29, 2012, Dr. Eke telephoned one of the former Maverick employees, Milenia Batista, who had submitted an application. Dr. Eke asked if she was still interested in working for the new company. She said yes, and he told her to report to the building on October 1, 2012.

On October 1, 2012, Rodriguez contacted Dr. Eke in the early afternoon at about 1:00 PM. She asked Dr. Eke if he was ready to start work that evening. Dr. Eke replied that he had a meeting scheduled for 5:00 PM, and he would select his staff. Rodriguez informed him that the county needed a list of the names of his employees.

Rodriguez went to the building at 5:00 PM. At that time, there were a number of former Maverick employees present as well as some employees formerly employed by Chuk's.

At this meeting, Eke announced which employees that Respondent would be hiring. Eke gave Rodriguez the names of the employees, which she recorded and later typed into a list.

Respondent hired 12 employees on that day, which included nine employees, who had been formerly employed by Maverick.[3]

[3] Amon, Batista, Caraballo, Castillo, Chica Ramirez, Colon, Garcia, Ventura and Zambrano.

Respondent also hired three other employees, who had not been former Maverick employees.[4]

Respondent also hired a day-time porter as a full-time employee, who had previously worked for Chuk's, named Daniel Okenye, who was the only full-time employee hired by Respondent. However, although Okenye worked for Respondent on the day shift for one day, October 1, he did not show up thereafter. He was eventually replaced by Jose Leon, who had been employed by Maverick.

On October 22, Brown sent a letter and a fax to Respondent, requesting recognition and asking for bargaining dates.

The letter reads as follows:

October 22, 2012

VIA FACSIMILE 347-398-9671 and OVERNIGHT MAIL
Dr. Milton Eke
President & Chief Executive Officer
Milveen Environmental Services
2253 Cincinnatus Avenue
Bronx, NY 10473

Re: Bergen County Public Building
One Bergen County Plaza, Hackensack, New Jersey

Dear Dr. Eke:

We were notified that Milveen Environmental Services took over the cleaning services for the Bergen County Public Building located at One Bergen County Plaza, Hackensack, New Jersey. As you may know Local 32BJ, SEIU represents the cleaners who worked at the above site.

As you have hired a majority of the incumbent employees, you are a successor employer to Maverick Building Services. Accordingly, Local 32BJ demands that we commence bargaining for a successor collective bargaining agreement. Please send me dates as soon as possible when you are available to meet.

Should you have any questions, please do not hesitate to contact me directly at 973-824-3225 x 2254.

---

[4] Martha Vazquez and Manual Chavez, who had been previously employed by Chuk's. Teresita Vargas was also hired on October 1, 2012. She was not a former Maverick employee. The record is unclear if she had worked for Chuk's previously.

Vargas testified that she had worked for the "other company" but did not specify which other company. She also testified that she had not worked at the building at One Bergen Plaza before. She testified that someone had told her to call, and she did and received and filled out an application. She confirmed that she was hired on October 1, 2012 and told on that day that she was going to be hired by Respondent.

We look forward to working together,

Sincerely,
Kevin Brown
New Jersey District Director

Eke did not respond to this letter. Polanco followed up Brown's letters with numerous phone calls between October of 2012 into January of 2013, wherein she left messages identifying herself and asking Respondent to call the Union and start the bargaining process.

Finally, on January 22, 2013, the Union filed its initial charge in Case No. 22-CA-096873, alleging that Respondent refused to recognize the Union, even though it is required to as a successor employer in violation of Section 8(a)(1) and (5) of the Act.

When Polanco came into the regional office to provide an affidavit in connection with the charge filed, she met with the board agent, who informed her that Eke has submitted a letter to the Region confirming a willingness to meet with the Union. The board agent gave Polanco a copy of Eke's letter, which reads as follows:

MILVEEN ENVIRONMENTAL SERVICES INC.

2253 CINCINNATUS AVENUE
BRONX, NY 10473
U.S.A.

Phone (917) 449-7466
Fax: (347) 398-9671
E-mail: ekel07@msn.com

Dr. Milton A. Eke
President & CEO

March 12, 2013

Mr. Erick Schechter
NARLB
Newark [SIC], NJ

Dear Mr. Schechter:

Is is a pleasure speaking with you. Regarding the issue with SEIU Local 32 BJ, I did not get anything from them. I do not know if any of staff got notice from them either. However, I have no objection meeting with them for bargaining. Meanwhile, I will be on vacation from March 13th, 2013 to March 31st, 2013. It will be appreciated if they can contact me early April 2013.

Thank

Sincerely
Dr. Milton A. Eke,
President

Polanco then sent two emails to Eke on March 26 and April 13, following up on the above letter and requesting dates to meet for bargaining. The emails are as follows:

From: Zaida Polanco
Sent: Tuesday, April 16, 2013 2:21PM
To: 'eke107@msn.com'
Cc: Kevin Brown; Brent Garren
Subject: RE: Bergen County Public Building - Request for Bargaining Dates

Dear Dr. Eke:

This email represents a follow up request with regards to our previous email dated 03/26/13. Kindly forward us dates for next week in which you are available to meet regarding bargaining with regards to the above matter.

Should you have any questions, please do not hesitate to contact me directly.

Thanks in advance.

From: Zaida Polanco
Sent: Tuesday, March 26, 2013 1:22PM
To: eke107@msn.com
Cc: Kevin Brown; Brent Garren
Subject: Bergen County Public Building - Request for Bargaining Dates

Dear Dr. Eke:

My name is Zaida Polanco and I'm the union delegate in charge of to the above matter. Kindly review the attached bargaining letter and please forward us dates in early April when you are available to meet.

Should you have any questions, please do not hesitate to contact us directly.

Thank you for your cooperation in this matter.

Zaida Polanco
New Jersey District Delegate SEIU Local 32BJ
1 Washington Park, 12th Floor
Newark, NJ 07102
P: 973-824-3225 Ext. 2234
F: 973-623-8602
zpolanco@seiu32bj.org

About a week after the last email, Polanco was finally able to reach Eke by phone. She let him know that she had called and written him numerous times and was trying to get in contact with him to set up bargaining dates. Eke responded that he did not have to bargain with the Union.

Polanco replied that she had received a copy of the letter that Eke had sent to the Labor Board, in which he had offered to bargain with the Union. She said let's just sit down and talk.

Eke then responded fine, and they discussed available dates, finally agreeing on May 1, 2013 at the union hall. Polanco send out an email to Respondent, confirming the meeting for May 1, 2013 and requesting information to be provided at the meeting. The email reads:

From: Zaida Polanco
Sent: Friday, April 26, 2013 3:55 PM
To: eke107@msn.com
Cc: Kevin Brown; Patricia Arcila Cabrera; Brent Garren
Subject: Bergen County Bldgs. - Bargaining Date - 5/01/13 CONFIRMED

Dear Dr. Eke:

As per our recent conversation, this email represents confirmation of our bargaining date of 05/01/13 @ 2pm at our SEIU 32BJ's offices located at 1 Washington Street, 12th Floor, Newark, New Jersey.

This email also represents a request for a copy of your company's handbook and/or work rules and seniority roster (including names, addresses, phone numbers, e-mail addresses, hire date, and wage rate) for all employees with regards to the above matter.

Should you have any questions, please do not hesitate to contact me directly at 973-296-4360.

It was a pleasure speaking with you today. We look forward to working together.

Zaida Polanco
New Jersey District Delegate SEIU Local 32BJ
1 Washington Park, 12th Floor
Newark, NJ 07102
P: 973-824-3225 Ext. 2234
F: 973-623-8602
zpolanco@seiu32bj.org

On May 1, the meeting was held as scheduled. Present was Cabrera, Polanco, Brent Garren, the Union's attorney, and Eke. The union representatives introduced themselves, and Cabrera requested the information requested in Polanco's email. Eke replied that he didn't have it.

Cabrera then asked Eke how much the workers were getting paid, what were their hours and whether the employees were receiving benefits, such as vacation pay, sick pay and other benefits that employees had previously under the contractor's agreement when they were employed by Maverick.

Eke responded that the employees were being paid $12.75 per hour with no benefits. He stated that Respondent has only one full-time worker and eleven part-timers and that the part-time employees received no benefits under the company's policy. Eke also informed the Union that the employees were working 3.5 hours a day although the employees had been working four hours a day while employed by Maverick. He told the Union that because of the RFP, he was following the requirement of paying $12.75 in wages and no benefits were required. He added that he wasn't only scheduling 3.5 hours for employees because he couldn't afford to pay for the four hours.

Cabrera furnished Eke a copy of NJ Contractors Agreement, which had been applied to the Maverick employees. She asked him to sign it and agree to its terms. Eke replied that he is a small company, and they only have this one account. Cabrera replied that there are benefits

to signing the Contractors Agreement and that when bids go out, he might get more contracts. Eke replied that he didn't have anything to do with Local 32BJ, he doesn't like to work with unions because unions interfere with administration and with companies.

Cabrera stated that the members enjoyed benefits and that Respondent was not supposed to change the terms and conditions because he never bargained with the Union. Thus, the Union was offering him the opportunity now to sign the contract.

Eke responded that he needed to speak to an attorney and wasn't going to sign at this time. Eke added that the employees had told him that they were non-union and now you are telling me that they are union members. Polanco indicated that the information was on the job application, and Cabrera asked to see copies of the job applications. Eke replied that he didn't have them and that the employees misled him.[5]

Eke then informed the union representatives that since the employees had misled him, he intended to have a meeting with the employees to ask them if they were members of the Union.

At that point, Garren interjected that he did not recommend that Eke speak to the employees because it is illegal to interrogate workers if they want a union or not or if they are union members.

Cabrera then suggested that they set up another meeting for after he reviews and discusses the contract with his attorney. Eke replied that he will meet again but wanted to review the contract with his attorney.

In a series of email exchanges between Cabrera and Dr. Eke from May 7 through May 15, Cabrera again requested information (employment applications, company handbook, work rules, seniority, names and addresses of employees) and bargaining dates. Eke responded, "I am sorry I cannot send you anything because my company is not a member of your union. Additionally, I am told that One Bergen Plaza has no contract with your union. If you want to meet to discuss this further, please let know. I am ready to meet you any time to bring this issue to a close."

Subsequent emails deal with finding a date to meet, and the parties ultimately agreed upon Monday, May 20 at 11:30 AM.

The parties met on May 20 at the Union's offices. Polanco, Cabrera and Eke were present. Cabrera began the meeting by repeating her request for the information she had requested previously. Eke responded that he did not have the information, that he did not have to bargain with the Union since he found out that the Union did not have a contract with Bergen County, and therefore, he did not have to work with the Union.

Cabrera replied that the Union represented 80% of the buildings, and the Union has contracts with the contractors, not the county. Thus, the Union wanted Respondent to sign the contractor's agreement with the Union for the representation of its employees. Dr. Eke responded that he would not sign the contract and added that his contract with the county will

[5] In fact, the job applications did not mention the Union at all or reflected that the employees were union members. Many of the applications did reflect that the employees worked for Maverick.

be finishing soon, and he was not planning on bidding any more.

Cabrera answered that if Respondent is walking away from the contract, why not sign the union contract, so it would be easier for all the workers to be union so that the next contractor will recognize the union contract.

Dr. Eke answered that he would not sign the contract and would not bargain with the Union because he conducted an investigation where he and De La Torre interviewed the employees and asked the employees whether they were union members. He added that the employees told him that they were not union members and that they didn't want the Union. Therefore, Eke stated that because of that, he did not have to bargain a contract with the Union.

Cabrera responded that Eke should not have interviewed the employees, the Union had advised him not to do it, and this conduct was harassing and terrifying the employees. Cabrera also informed Dr. Eke that he had violated the contractor's agreement by changing the terms and conditions of employment of the employees and added that the Union was going to file charges with the NLRB for Respondent's refusing to bargain with the Union.

Dr. Eke replied that he was the owner of the company, and he could meet with his employees to ask them if they were union members.

The meeting concluded, and the Union then filed its second charge in Case No. 22-CA-105863 on May 20, 2013, alleging that Respondent coercively interrogated employees concerning their support for the Union.

The record reflects that on May 2 Dr. Eke instructed De La Torre to ask the employees if they are union members since he was considering signing a union contract and he wants to make sure that they are still union members. De La Torre then spoke to the unit employees and told Eke that he had spoken to the employees and asked them if they were union members. They responded no that they are not union members and do not want the Union.

De La Torre prepared a handwritten document reflecting these conversations and gave it to Dr. Eke.

The document is dated May 2, 2013 and is entitled, One Bergen Plaza, Hackensack, N.J., list of employees.

The document then lists 12 employees, including De La Torre.

The document states, "I spoke with all the employees and we all agree we don't want the Union."

On the bottom of the document, it reads, "Thank you. Julio."

A few days later, Dr. Eke met with each employee individually to confirm what the employees told De La Torre and obtain signatures from employees on a document.

The employees were informed by De La Torre to go and see Dr. Eke. De La Torre told employee Milenia Batista that the gentleman (Dr. Eke) did not want a union and all the employees had to sign a petition.

The employees were spoken to by Dr. Eke individually. Dr. Eke told them that if they

agreed with what De La Torre said that they did not want to be union members any longer, they should sign the document that he was giving them.

All of the employees signed the document, including De La Torre.

The document reads as follows:

To: The Management
Milveen Environmental Services, Inc

We the undersigned staff of Milveen Environmental Services, Inc. working at One Bergen Plaza, Hackensack, New Jersey state that we are not interested in membership of any union.

NAME	SIGNATURE	membership NO	YES
JENNY GARCIA	Jenny García	NO	
GLORIA AMON		NO	
MANUEL CASTELLO		NO	
TERESITA VARGAS		NO	
MILENIA BATISTA		NO	
AYDEE CHICA		NO	
NARCISA ZAMBRANO		NO	
ROMALINDA COLON		NO	
ANA BALDA	Ana Balda	NO	
ANA MORONTA	Ana moronta	NO	
JULIO DE LA TORRE		NO	
JOSE LEON		NO	

Both Dr. Eke and employee Milenia Batista testified that De La Torre was a supervisor of Respondent's night shift employees. He was responsible for assigning work and deciding which employees clean which areas. When workers call in sick, they call De La Torre. Dr. Eke testified that he visits the building at Bergen Plaza once a week and that De La Torre "is supervising."

De La Torre performed no cleaning tasks himself but directed and supervised the other employees on the shift.

Batista testified that De La Torre sent an employee home because of some misconduct. Batista also testified that De La Torre once suspended her because she left work 15 minutes early. She further testified that she was upset about the suspension and because her pay was falling behind, so she decided to resign from her position at Respondent's on January 6, 2014.

According to Dr. Eke, he spoke to an employee, who had said she was quitting, and tried to convince her to stop. He did not mention the name of the employee but said that she was a good worker and the county had liked her, and he wanted her to stay with Respondent. He tried to speak with her but had difficulty because the employee spoke very little English. Eke states he was able to ask her not to leave and asked why she was leaving. Accordingly to Eke, the employee waved her hands and said, "No, no, no" and didn't say anything else nor did she explain why she was leaving. Eke further testified that he asked De La Torre what had happened. De La Torre told Eke that he changed the schedule and that the employee did not like a work assignment that he had given to her.

After Batista left, Respondent hired a replacement for her by the name of Ana Balda. Eke admitted that De La Torre hired Balda as an employee for Respondent after an employee left and another employees had recommended Balda and that De La Torre had hired Balda on his own and had the authority to do so.

Eke also admitted that in September when he agreed to hire De La Torre as the night supervisor that De La Torre recommended to Eke that Respondent hire the former Maverick employees, who had worked with him and who were good employees. Eke also admitted that he furnished job applications to be given to De La Torre to be distributed to the employees and that Respondent did receive these applications.

The record reflects that De La Torre spoke to employee Batista at the start of her employment with Respondent and told her that she was going to work but without a union.

III. Analysis and Conclusions

A. Status of Julio De La Torre

The complaint alleges that Julio De La Torre was a supervisor and an agent of Respondent.

Section 2 (11) of the Act define a supervisor as an individual having the authority to hire, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or responsibility to direct them or effectively recommend such actions, if in connection with the exercise of such authority, is not merely of a routine or clerical nature but requires the use of independent judgment.

Here, the evidence demonstrates that De La Torre had the authority to exercise and exercised several indicia of supervisory authority to make him a supervisor of Respondent. De

La Torre effectively recommended that Respondent hire the former Maverick employees, and Respondent accepted De La Torre's recommendation to hire nine of these employees. Additionally, De La Torre hired on his own one employee, Balda, as a replacement for an employee, who had left Respondent's employ. De La Torre also suspended employee Batista.

De La Torre also assigned and directed employees' work, utilizing his independent judgment.

Respondent, in fact, does not deny that De La Torre was a supervisor, on and after October 1, 2012, when it started operations at One Bergen Plaza. However, it disputes that he was a supervisor or an agent of Respondent prior to that time.

However, I conclude that De La Torre was a supervisor and agent of Respondent on and after September 21, 2012. Thus, the evidence discloses that on that date when Rodriguez was discussing Respondent's intentions to hire its staff at the building, she recommended that he hire De La Torre. She informed him that De La Torre had experience working at the building (he had worked there as an employee for Maverick and was, at the time, still employed at the building by the county to perform recycling work and was an excellent employee), and she suggested that De La Torre could help Respondent "manage" the building. Eke followed Rodriguez's recommendation, spoke to De La Torre on that day and agreed to hire him as Respondent's night supervisor when Respondent starts work at the building on October 1, 2012.

Immediately, after that conversation, De La Torre phoned employees, including former shop steward Marin, and told her that Respondent would be hiring the former Maverick employees but that Respondent did not want the Union.

In such circumstances, I conclude that De La Torre was a supervisor and an agent of Respondent on September 21, 2012, even though he had not started to actually work and get paid by Respondent until October 1, 2012. Further, even if De La Torre was not found to be a supervisor as of September 21, Respondent placed him in a position to be involved in the hiring of its employees, to discuss it with applicants, who had previously worked with him at the building, to give out and receive job applications from them and is, therefore, responsible for De La Torre's statements to the employees about such hiring. *Weco Cleaning Specialists*, 308 NLRB 310, fn. 2, 318, fn. 14 (1992) (contractor agreed to hired former supervisor of prior contractor as supervisor; although he had not started working for new contractor, the individual was authorized to and did interview employees, provide them job applications and informed the employees that they would be hired; individual found to be agent of contractor with respect to statements made by individual concerning hiring); *American Press Inc.*, 280 NLRB 937, 941-942, fn. 10 (1986) (individual utilized by new employer in hiring found to be an agent of employer, where employer urged individual to refax information about hiring to former employees of predecessor, asked individual to tell the employees to turn in applications, authorized him to contact employees about employment and asked for and received evaluations of former employees by individual and followed individual's recommendation to hire employees).

I, therefore, conclude that De La Torre was a supervisor and an agent of Respondent as of September 21, 2012 and that Respondent was responsible for his comments to employees and conduct with respect to hiring by Respondent.

B. The Alleged 8(a)(1) Violations

The complaint alleges that Respondent interrogated its employees about their union membership, activity and sympathies. This allegation relates to Respondent's conduct in May of 2013 when De La Torre asked employees if they were members of the Union and if they wanted the Union, and he handed a document to Eke stating that he had spoken to all 12 listed-employees of Respondent and "we all agree we don't want the Union."

Eke followed up this by speaking to employees individually and asking them to confirm what De La Torre had written and to sign another document, which reads, "We the undersigned staff of Milveen Environmental Services, Inc. working at One Bergen Plaza, Hackensack, N.J. state that we are not interested in membership in any union." This document was signed by all 12 employees, including De La Torre. Further, De La Torre informed employee Batista that she had to sign this document, and Batista testified that she only signed it because she was afraid that she would be terminated.

The conduct of Respondent, described above, constituted coercive interrogation of its employees concerning their membership in and support of the Union. *W&M Properties*, 348 NLRB 162 (2006), enfd. 514 F.3d 1341 (DC Cir. 2008); *Perdue Farms Inc. v. NLRB*, 144 F.3d 830, 835-836 (DC Cir. 1998); *Advanced Stretchforming International*, 323 NLRB 529 (1997), enfd. in relevant part. 233 F. 3d 1176 (9th Cir. 2000) (polling its employees concerning union representation is coercive and violative of Section 8(a)(1) of the Act).

I, therefore, find that Respondent has violated 8(a)(1) of the Act by interrogating its employees concerning their union membership and union activities.

The record also reflects that Respondent through De La Torre, and through Marin in September of 2012, informed the former Maverick employees that Respondent was the new contractor at One Bergen Plaza, that he had been hired as night supervisor and that Respondent intended to hire them as its employees, starting October 1 and that Respondent did not want the Union. Marin transmitted this message to the other former Maverick employees. De La Torre also told Batista, personally, in a conversation at the start of her working for Respondent on October 1, that the employees were going to work for Respondent "but without a union."

By such conduct, Respondent has informed job applicants and its employees that it did not want the Union and would not be union. Such statements impliedly condition their employment on refraining from union membership or activities and are violative of Section 8(a)(1) of the Act. *W&M Properties*, supra, 348 NLRB at 162 (informing employee that if he accepted job, it would be non-union); *Pressroom Cleaners*, 361 NLRB No. 57, fn. 1 slip op at 24-26 (2014) (statements to applicants that employer was "non-union," does not work with unions "and does not want a union at all"); *Smoke House Restaurant*, 347 NLRB 192, 203 (2006) (telling employees and applicants that it would operate non-union); *Eldorado Inc.*, 335 NLRB 952, 953 (2001) (informing applicants for employment that the new business would be a non-union company; Board concluded that when a supervisor-employer tells applicants that the company will be non-union before it hires its employees, the employer indicates to employees that it intends to discriminate against (the predecessor's) employees to ensure its non-union status"); *Concrete Company*, 336 NLRB 1311, 1316 (2001) (informing employees of the predecessor that there would be no union at the facility and the "union is gone*"); Pacific Custom Materials*, 327 NLRB 75 (1998) (statements that new company was non-union and that employees would be rehired, but there would be non-union); *Advance Stretchforming International*, supra, 323 NLRB at 529 (telling prospective employees that there would be no

union; Board concludes that statement was a "clearly unlawful" message to employees that the respondent would not permit them to be represented by the union").

Accordingly, I find that Respondent has violated Section 8(a)(1) of the Act by the above comments made to applicants and employees by De La Torre. *Pacific Custom Materials*, supra, 327 NLRB at 75, 78-79 (statement made by new plant manager of successor employer to applicants that new company was non-union was binding on successor employer since he had been offered and accepted position of plant manager, although he had yet started his employment at employer at the time he made comments to applicants, who were employed by predecessor).

C. The Refusal to Recognize and Bargain with the Union

It is well-settled that an employer succeeds to the collective bargaining obligation of another employer if (1) a majority of the employees in an appropriate unit at, or after, the time at which the union makes its bargaining demand, had been employed by the predecessor, and if (2) the similarities between the two operations manifest a "substantial continuity" between the two enterprises. *Capital Steel*, 299 NLRB 484, 485 (1990); *CitiSteel USA*, 312 NLRB 815 (1993), enf. denied 53 F.3d 350 (DC Cir. 1995); *Fall River Dyeing v. NLRB*, 482 US 27, 41-43 (1987).

To determine successorship, the Board looks at the totality of the circumstances to see if the successor has continued the predecessor's business operations without substantial change. *Fall River*, supra at 43.

Fall River, supra details the "substantial continuity" analysis:

> "Hence the focus is on whether there is a "substantial continuity" between the enterprises. Under this approach, the Board examines a number of factors, whether the business of both employers is essentially the same, whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisor, and whether the new entity has the same production process, produces the same products and basically has the same body of customers."
>
> Id at 43

These factors are to be assessed primarily from the perspective of the employees involved; that is "whether the employees, who have been retained, will understandably view their job situation as essentially unaltered. *Fall River*, supra at 43; *Nephi Rubber Products Corp.*, 303 NLRB 151, 152 (1991); *CitiSteel USA*, supra, 312 NLRB at 815.

Here, the evidence discloses that Respondent's workforce consisted of nine former Maverick employees, two other bargaining employees and De La Torre, a former unit employee, now hired as a supervisor. Thus, Respondent has clearly hired a majority of Maverick's workforce, who had been represented by the Union. The evidence further discloses that substantial evidence of continuity of the business enterprise since Respondent performs the same contract cleaning services for the county and cleans the same public building under a supervisor, who was previously a former Maverick bargaining unit employee. Thus, from the employees' perspective, they continue to perform the same job with the same working conditions in the same location for the same customers. *Sierra Realty*, 317 NLRB 832, 835 (1995) (real estate company that previously contracted out cleaning work to subcontractor represented by union found to be a successor when it cancelled contract and hired its own

employees to perform work; Board finds successorship since notwithstanding the fact that its business was managing real estate rather than performing maintenance services since from perspective of the displaced employees, they would have perceived employer as the entity that displaced contractors as the employer and viewed their job situation as essentially unaltered).

Respondent argues that it cannot be found to be successor to Maverick since the work at the building was performed by Chuk's, an intervening contractor for six months before Chuk's contract was cancelled and Respondent was awarded the contract. I disagree.

The hiatus between April 9 and October 1 does not relieve Respondent of its successor obligations.

The Supreme Court in *Fall River*, supra noted that a hiatus is only one factor in the substantial continuity analysis and is relevant only when there are other indicia of discontinuity. Id at 45. *NLRB v. Band Age Inc.*, 534 F.2d 1, 5 (1st Cir. 1976). Here, there are no "other indicia of discontinuity" for Respondent's employees. Thus, the hiatus is not determinative in assessing continuity of operations. *Aircraft Magnesium*, 265 NLRB 1344, 1346 (1982), enfd. 730 F.2d 767 (9th Cir. 1984).

When examining the continuity of the employing entity, the Board looks at the objective factors and how they might reasonably affect the objective attitude of the employees. *Straight Creek Mining*, 323 NLRB 759, 764 (1997). There, despite a hiatus of 54 months in operations (due to a strike) by the predecessor employer and the startup of the new employer's operation, the hiatus did not establish a loss of "substantial continuity" of identity between the predecessor and successor employers.

Similarly in *Nephi Rubber Products Corp.*, 303 NLRB 151, 152-153 (1991), the Board found that a 16-month hiatus in plant operation due to bankruptcy was insufficient to defeat the successorship obligation and the "substantial continuity of the employing industry" necessary for the successorship obligation to attach. The Board emphasized there, as it has in numerous other cases, that "in the successorship situations, the events must be viewed from the employees' perspective (i.e. whether their job situation has so changed that they would change their attitude about being represented"). Id at 303 NLRB at 152. *Derby Refining Co.*, 292 NLRB 1015 (1989), enf. 915 F.2d 1448 (10th Cir. 1990).

In *CitiSteel USA*, supra, a 23-month hiatus between the closing of the facility and the reopening by the new owner was insufficient to establish discontinuity of the entity, even where the local union was deactivated during this period.

In *Phoenix Pipe and Tube Co.*, 302 NLRB 122, 126-127 (1991), the predecessor employer closed the plant, filed for bankruptcy and laid off all employees. The new employer purchased the plant and real estate with approval of the Bankruptcy Court after a 13-month hiatus in operations. The Board concluded that the 13-month hiatus in operations did not defeat the employees' expectation of continued representation by the union, and quoting the Supreme Court opinion in *Fall River*, supra: "In conducting this analysis, the Board keeps in mind the question whether, "those employees who have been retained will understandably view their job situation as essentially unchanged." See *Golden State Bottling Co.*, 414 US 169, 184 (1973); *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 464 (9th Cir. 1985), the emphasis on the employees' perspective furthers the Act's policy of industrial peace. If the employees find themselves in essentially the same jobs after the employer transitioned and if their legitimate expectations in continued representation by their union are thwarted, then dissatisfaction may lead to labor unrest. *Fall River*, supra at 43-44.

Here, as in all of the above cases, the Union remained active at the building in pursuing representation of the employees by trying to persuade the interim purchaser, Chuk's, to hire the former Maverick employees, picketing and leafleting at the building in support of such demands and by trying to convince the county to cancel the contract with Chuk's. Ultimately, the county did cancel the contract with Chuk's, and Respondent was the successful bidder for the work.

Since the work performed by the employees of Respondent was essentially the same as it was when performed by them when they were employed by Maverick, from the employees' perspective, their expectations have not changed, and the substantial continuity of the operations is unaffected. Therefore, since a majority of Respondent's workforce consisted of employees, who had been employed by Maverick (and who had been represented by the Union at that time), there was a "substantial continuity of the employing industry," and Respondent was a successor to Maverick. *Nephi Products*, supra; *CitiSteel*, supra; *Straight Creek Mining*, supra; *Phoenix Tire & Rubber*, supra. See also *United Maintenance & Manufacturing Co.*, 214 NLRB 529, 532-533 (1974) (4.5-month hiatus in operations due to strike insufficient to defeat successorship finding in view of the fact that when operations resumed under new owner, operations were unchanged).

Accordingly, I conclude that the contract between the interim employer (Chuk's) and the county is akin to a six-month hiatus in operations, which did not disrupt the continuity of operations nor call into question the employees' support for the Union. See *First Food Ventures Inc.*, 229 NLRB 1228, 1229-1230 (1977) (fact that a different interim employer took over the operations before the successor purchased the business did not affect the status of employer as a successor to prior company, whose employees had been represented by union before company was purchased by intervening employer).

Therefore, Respondent was a successor to the Maverick operating entity, and it was obligated to recognize and bargain with the Union.

Although Respondent did ultimately agree to meet and bargain with the Union (after the Union filed its initial charge and after a discussion with the board agent), it essentially changed that position after meeting with the Union and refusing to sign the Union's proposed contract. Respondent then refused to sign the contract and refused to bargain any further with the Union, asserting that it had no obligation to deal with the Union since the Union had no contract with the county, Chuk's employees was not represented by the Union and Respondent had ascertained from its employees that they were no longer members of the Union and not interested in the union.

I agree with General Counsel that the above circumstances demonstrated an unlawful refusal to recognize and bargain with the Union in violation of Section 8(a)(1) and (5) of the Act. It could be argued that Respondent did not refuse to bargain with the Union since it met with the Union and merely refused to sign the Union's proposed contract. However, Respondent could not refuse to bargain or thereafter recognize the Union, although it was not required to sign the Union's contract.

Respondent seemed to have misperceived its obligations to bargain and did not seem to understand the difference between the obligation to bargain and the obligation to sign the union contract.

By agreeing to recognize and bargain with the Union, Respondent was not obligated to sign the prior union contract but merely to bargain in good faith with the Union over the terms

and conditions of employment for its employees to be included in the new contract. Respondent was free to accept or reject the Union's contract proposals, in whole or in part, and was free to make counterproposals to or make modifications of the Union's contractual demands. Here, once Respondent decided that it did not want to sign the Union's proposed contract, it concluded that it would not only refuse to do that but it would refuse to recognize or bargain with the Union any longer, in effect, withdrawing recognition. This conduct is clearly unlawful and represents an unlawful refusal to recognize and bargain with the Union.

Respondent cannot rely on the petition signed by the employees concerning membership and desires for representation of the Union. These petitions were the result of unlawful interrogations by Respondent's supervisor, De La Torre, as I have found, and cannot justify a withdrawal of recognition or a refusal to continue bargaining with the Union.

Accordingly, based upon the above analysis and precedent, I conclude that Respondent was a successor to Maverick and that it violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union (or alternatively, by withdrawing recognition from the Union).

D. The Unilateral Changes

The complaint alleges and the General Counsel contends that Respondent as the statutory successor to Maverick was obligated to recognize and bargain with the Union, and I have so found as explained above.

The complaint also alleges that Respondent unilaterally changed various terms and conditions of employment that Maverick employees enjoyed without notifying and bargaining with the Union. The record established that Respondent did not consult with the Union before it fixed its terms and conditions of employment for the employees, whom it hired.

Some of the changes from the terms of employment made by Respondent included changing work hours from 4 hours per day to 3.5 hours per day for the night shift employees,[6] the failure to make payments to the Union's healthcare, legal services and training funds and failure to pay sick leave, personal day benefits and vacation benefits to employees.

It is well-settled that a statutory successor is not bound by the substantive terms of the predecessor's collective bargaining agreement and is ordinarily free to set initial terms and conditions of employment. *NLRB v. Burns Services Inc.*, 406 US 272, 280, 281 (1972); *Pressroom Cleaners*, supra, 361 NLRB at 1; *Love's Barbeque*, 245 NLRB 78, 82 (1979), enfd. in relevant part 640 F.2d 1094 (9th Cir. 1981); *Monterey Newspapers*, 334 NLRB 1019, 1020-1021 (2001); *Spruce Up*, 209 NLRB 194, 195 (1974).

However, that right is forfeited where the successor unlawfully refuses to hire the predecessor's employees. *Pressroom Cleaners*, supra; *Planned Building Service Employees*, 347 NLRB 670, 674 (2006); *Love's Barbeque*, supra; *State Distributing Co.*, 282 NLRB 1048, 1049 (1987); *Pace Industries v. NLRB*, 118 F.3d 585 (8th Cir. 1997); *US Marine Corp. v. NLRB*, 944 F.2d 1305 (7th Cir. 1991).

In *Advanced Stretchforming International*, 323 NLRB 529, 530-531 (1997), enfd. in

[6] The collective bargaining agreement between Maverick guaranteed four hours per day for such employees.

relevant part. 233 F.3d 1176 (9th Cir. 2000), the Board applied the reasoning of the above cited cases to successors, who, although they did not unlawfully refuse to hire the predecessors' employees, did inform their employees that they intended to operate non-union.

The Board reasoned as follows:

> This equitable doctrine, which arose in the context of defining an appropriate remedy for an employer that sought to avoid the successor's bargaining obligation by refusing to hire applicants from the predecessor's unionized work force,[8] is equally relevant to the allegation here of unlawful unilateral changes. The fundamental premise for the forfeiture doctrine is that it would be contrary to statutory policy to "confer *Burns* rights on an employer that has not conducted itself like a lawful *Burns* successor because it has unlawfully blocked the process by which the obligations and rights of such a successor are incurred." *State Distributing Co.,* 282 NLRB 1048, 1049 (1987). In other words, the *Burns* right to set initial terms and conditions of employment must be understood in the context of a successor employer that will recognize the affected unit employees' collective-bargaining representative and enter into good-faith negotiations with that union about those terms and conditions.
>
> Of course, unlike in *U.S. Marine, Love's Barbeque,* and *State Distributing Co.,* there is no allegation in this case that the Respondent unlawfully discriminated in its hiring practices. In fact, it looked exclusively to the predecessor's unionized work force and hired a majority of Aero's unit employees in forming its own initial employee contingent. Furthermore, for purposes of this litigation, the Respondent conceded that it was a *Burns* successor bound to recognize the Union when plant operations resumed on December 1.
>
> *At the time of successorship,* however, the Respondent did not conduct itself like a lawful *Burns* successor. At this unsettling time of transition, when "a union is in a peculiarly vulnerable position" and employees "might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor,"[9] the Respondent unlawfully declared through Cunningham to all Aero employees that there would be no union for those whom it hired. Fourteen days later, the Respondent relied on the results of an employee poll tainted by Cunningham's statement when it refused to bargain with the Union and thereafter refused to recognize the Union as the unit employees' representative.
>
> A statement to employees that there will be no union at the successor employer's facility blatantly coerces employees in the exercise of their Section 7 right to bargain collectively through a representative of their own choosing and constitutes a facially unlawful condition of employment. Nothing in *Burns* suggests that an employer may impose such an unlawful condition and still retain the unilateral right to determine other legitimate initial terms and conditions of employment. A statement that there will be no union serves the same end as a refusal to hire employees from the predecessor's unionized work force. It "block[s] the process by which the obligations and rights of such a successor are incurred." *State Distributing,* 282 NLRB at 1049.
>
> In sum, we hold that by declaring at the outset that there would be no union at its facility, the Respondent, like a successor that discriminatorily refuses to hire a majority of its predecessor's employees in order to avoid recognizing and bargaining with a union, forfeited its *Burns* right to set initial terms and conditions of employment without first bargaining with the Union. Accordingly, we find that the Respondent violated Section

8(a)(5) and (1) of the Act by unilaterally changing wages and benefits when it commenced operations.

[8]See *Love's Barbeque Restaurant*, supra.
[9]*Fall River Dyeing & Finishing v. NLRB*, 482 US 27, 39-40 (1987).

The Board's holding in *Advanced Stretchforming*, supra has been subsequently adopted and followed by the Board in numerous subsequent cases. *Pressroom Cleaners*, supra, ALJD slip op at 39; *Mammoth Coal*, 354 NLRB 687, 689, 729 (2009); *Smoke House Restaurant*, 347 NLRB 192, 204-205 (2006); *Concrete Co.*, 336 NLRB 1311 (2001); *El Dorado Inc.*, 335 NLRB 952-953 (2001); *Worcester Mfg.*, 306 NLRB 218, 219 (1992).

Here, the facts fall precisely within the rationale of Advanced Stretchforming, supra and its progeny. De La Torre, Respondent's supervisor, told the former Maverick employees that Respondent was interested in hiring them but on the conditions that Respondent did not want a union. This message was transmitted to employee Marin, who, in turn, transmitted it to the remaining employees of Maverick. Thus, by this conduct, Marin became Respondent's agent as well. Further, De La Torre made a similar comment to employee Batista at or around the time of her hiring.

Finally, De La Torre did not testify, so then an adverse inference is warranted that his testimony would not support Respondent's position and that he, in fact, told the other employees that Respondent would hire them but did not want the Union. *International Automated Machines*, 285 NLRB 1122, 1123 (1987).[7]

Additionally, as in *Advanced Stretchforming*, supra, Respondent relied on the results of an unlawful poll of the employees to justify its refusal to recognize and bargain further with the Union.

Thus, based upon the above precedent and analysis, Respondent was not privileged to change working conditions and hours that were established when its employees had been employed by Maverick without notifying the Union and bargaining to impasse with the Union before making such changes.

I also conclude that even apart from the "no union" statements made by Respondent to prospective employees that Respondent forfeited its right to set its initial terms and conditions of employment for an additional reason.

As noted above, the Supreme Court held that a new (successor) employer is generally free to set the initial terms, in which it will hire employees without bargaining with the union, but created an exception, where the employer plans to hire the employees and is a "perfectly clear" successor. The Board interpreted the "perfectly clear" exception of the Supreme Court in *Burns* in *Spruce Up*, 209 NLRB 194 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975). The Board concluded that the "perfectly clear" exception and the consequent forfeiture of the right to set initial terms should be restricted to circumstances, where the new employer has either actively or by tacit interference misled employees into believing that they would all be retained without

[7] I also note that De La Torre informed Polanco that Respondent did not want the Union in the building and that that was the only condition for the employees to get hired. This comment by De La Torre is construed as an admission against Respondent, even though De La Torre had not, as of yet, started working for Respondent when he made the statement. *Weco*, supra.

change in their wages, hours or conditions of employment or at least to circumstances, where the new employer has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. *Spruce Up*, supra at 195; *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 980 (2007); *Fremont Ford*, 289 NLRB 1290, 1296 (1988); *Starco Farmers Market*, 237 NLRB 373 (1978).

In applying that precedent here, I agree with General Counsel and Charging Party that Respondent has not shown, and the record does not establish, that Respondent announced to its employees prior to or at employing them that they would be working under different conditions of employment than they had been working under Maverick. Thus, Respondent, here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. *Fremont Ford*, supra; *Windsor Convalescent*, supra; *Starco Farmers Market*, supra.

The evidence does reflect that De La Torre notified Polanco on September 26, prior to their hiring that employees would be hired by Respondent at a rate of $12.75 per hour with no benefits or $10.75 with benefits. However, Polanco was not an employee, and De La Torre did not direct Polanco to transmit this message to employees nor does the record reflect that she did so.

Further, it is questionable whether this comment, even if transmitted to employees, was a sufficiently clear announcement of all changes in employment terms. *Windsor Convalescent*. Moreover, any ambiguity as to what Respondent would have done must be resolved against Respondent since it cannot be permitted to benefit from its unlawful conduct. *Fremont Ford*, supra.

I also note the absence of any evidence from Eke or any employee that anyone from Respondent clearly informed them of their new terms and conditions of employment prior to their hiring. Indeed, both Batista and Vargas (Respondent's own witness) testified that on October 1, the date of their hiring, no one from Respondent (De La Torre or Eke) said anything to them about their salaries or conditions of employment.

In these circumstances, I conclude that Respondent had failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment and has, thereby, forfeited its right to set initial terms of employment with Respondent without consulting with and bargaining with the Union about such changes. *Fremont Ford*, supra; *Windsor Convalescent*, supra; *Starco Farmers Market*, supra.

Accordingly, I conclude that Respondent has violated 8(a)(1) and (5) of the Act by unilaterally changing terms and conditions of employment of its employees.

Conclusions of Law

1. Respondent, Milveen Environmental Services, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union, Local 32BJ, Service Employees International Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is and has been the exclusive collective bargaining representative for Respondent's employees in the following appropriate unit:

All full-time and part-time employees employed at Bergen County Public Building, One Bergen County Plaza, Hackensack, New Jersey, excluding guards and supervisors as defined in the Act.

4. By informing applicants for employment and employees that it intends to operate with no union and that it did not want the Union in the building and that employees would be hired but without the Union and by coercively interrogating its employees concerning their membership on behalf of the Union, Respondent has violated Section 8(a)(1) of the Act.

5. By refusing to recognize and bargain with the Union since October 1, 2012 and by unilaterally changing the terms and conditions of employment of its employees in the unit without prior notification and bargaining with the Union, Respondent has violated Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent unlawfully refused to bargain collectively with the Union, I shall recommend that the Respondent, on request, recognize and bargain with the Union concerning wages, hours, benefits, and other terms and conditions of employment, and if an agreement is reached reduce the agreement to a signed written contract. Additionally, the Respondent shall on request of the Union, rescind any departures from terms of employment that existed when the employees were employed by Maverick and retroactively restore preexisting terms and conditions of employment, such as restoration of hours and payment to benefit funds that would have existed absent Respondent's unlawful conduct, until the Respondent negotiates in good faith with the Union to agreement or to impasse. *New Concepts Solutions LLC*, 349 NLRB 1136, 1161 (2007). Backpay shall be computed as in *Ogle Protection Service*, 183 NLRB 602 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. The Respondent shall also remit all payments it owes to employee benefit funds in the manner set forth in Merryweather Optical Co., 240 NLRB 1213 (1979), and reimburse its employees for any expenses resulting from the Respondent's failure to make such payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2v(1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Milveen Environmental Services, Bronx, New York and Hackensack, New Jersey, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Coercively interrogating its employees concerning their membership in or activities on behalf of Local 32BJ, Service Employees International Union (the Union).

(b) Informing employees or applicants for employment or it intends to operate as a non-union business or that employees would be hired without the Union.

(c) Refusing to recognize and bargain in good faith with Local 32BJ, Service Employees International Union, as the exclusive collective-bargaining representatives of its employees in the following appropriate unit:

All full-time and part-time employees employed at Bergen County Public Building, One Bergen County Plaza, Hackensack, New Jersey, excluding guards and supervisors as defined in the Act.

(d) Unilaterally changing wages, hours and other terms and conditions of employment of the employees in the above-described unit without first giving notice to and bargaining with the Union about these changes.

(e) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify the Union in writing that it recognizes the Union as the exclusive representative of its unit employees under Section 9(a) of the Act and that it will bargain with the Union concerning terms and conditions of employment for employees in the above-described appropriate unit.

(b) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(c) On request of the Union, rescind any departures from terms and conditions of employment that existed for the employees previously employed by Maverick Building Services, Inc. (Maverick), retroactively restoring preexisting terms and conditions of employment until it negotiates in good faith with the Union to agreement or to impasse.

(d) Make whole, in the manner set forth in the remedy section of this decision, the unit employees for losses caused by the Respondent's failure to apply the terms and conditions of employment that existed for the employees when they were employed by Maverick.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, timecards, personnel records and reports, and all other

records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Hackensack, New Jersey facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2012.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 19, 2015

_____
Steven Fish,
Administrative Law Judge

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT inform our employees or applicants for employment that we intend to operate with no union or that our employees would be hired without the Union.

WE WILL NOT refuse to recognize and bargain in good faith with Local 32BJ, Service Employees International Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All full-time and part-time employees employed at Bergen County Public Building, One Bergen County Plaza, Hackensack, New Jersey, excluding guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change wages, hours and other terms and conditions of employment of the employees in the above-described unit without first giving notice to and bargaining with the Union about these changes.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL notify the Union in writing that we recognize it as the exclusive representative of its unit employees under Section 9(a) of the Act and that we will bargain with the Union concerning terms and conditions of employment for employees in the above-described appropriate unit.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL on request of the Union, rescind any departures from terms and conditions of employment that existed for the employees previously employed by Maverick Building Services, Inc., retroactively restoring preexisting terms and conditions of employment until we negotiate in good faith with the Union to agreement or to impasse.

WE WILL make whole, our employees for losses caused by our failure to apply the terms and conditions of employment that existed for the employees when they were employed by Maverick, plus interest.

MILVEEN ENVIRONMENTAL SERVICES

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

20 Washington Place, 5th Floor

Newark, New Jersey 07102-3110

Hours: 8:30 a.m. to 5 p.m.

973-645-2100.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-096873 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.